WILL THE PEOPLE OF THE UNITED STATES

BE BENEFITED

BY AN

International Copyright Law,

OR,

WILL SUCH A LAW BE AN INJURY TO THEM?

BY

FRED'K GERHARD.

NEW YORK.

1868.

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TO THE HONORABLE

MEMBERS OF CONGRESS,

Most Respectfully Dedicated,

BY

THE AUTHOR.

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The question of International Copyright has a manifold bearing, for it not only affects the pecuniary interests of a large number of our citizens, but also the intellectual life and progress of the whole nation; and for that reason it should be examined carefully and calmly, and considered in all its various relations to the rights and the welfare of the people at large. Such an examination of the subject makes it necessary, firstly: To analyze the terms "intellectual property" and "literary property;" secondly: To fully understand the purport of an international copyright law; and thirdly: To consider the effects such a law would of necessity produce. It is my purpose to discuss these leading ideas in as short and clear a manner as possible, and I believe that such a discussion will convince the most inveterate antagonist of my views on this question that an International Copyright Law would be injurious to the best interests of the people of the United States.

The prohibition of the reprint of literary works which is incorporated into the laws of all civilized nations, presupposes a "right," which it is the purpose of this prohibition to protect, and this right is now generally known by the terms *intellectual property* or *literary property*. To judge of the right or

wrong of national and international reprint, it is necessary to weigh and answer the following questions: 1. "What is intellectual property, and in what does it consist?" and 2. "What is literary property, and how is it distinguished from intellectual property?" Neither the Roman nor the Common law, the foundation of the modern jurisprudence of all civilized nations, know such terms as "intellectual property" or "literary property;" neither are they found in the positive laws of modern times; they are not well-defined legal terms, but are merely accepted by common consent as terms expressive of certain ideas, and have become established to a certain extent by usage. Although much has been said and written upon this subject, the abstract ideas conveyed by the terms "intellectual" and "literary" property, are only vaguely defined, and its bearings and limits are by no means fixed. Consequently, the right so denominated, has no established position in the legal code, which would so limit and define it as to put it on an equality with other acknowledged rights, vested by law in individuals. The term "property" itself is, in fact, only applicable to material substances, over which the owner has a perfect and exclusive control, of which he can at his pleasure dispose, and which he can alter or destroy at will. Now these qualities do not appertain to what is termed literary or intellectual property. A person's ideas or thoughts are his intellectual property only so long as

they remain unuttered and unknown to others; but the moment he communicates them to the public, by speech, designs, writing, or any other mode, they cease to be his exclusive property and belong thenceforth to the community at large; for from that moment he has lost control of them, he can no longer alter or destroy them at will. The oration pronounced from the rostrum, the sermon preached from the pulpit, cease to be the intellectual property of the orator or preacher, as soon as publicly delivered, just as a new contrivance introduced in mechanics, or a new pattern designed by the manufacturer, becomes common property, as soon as brought into market. We may therefore define the term "intellectual property" as a man's thoughts and ideas, as long as they are not made public. The versification of the poet, the results of the philosopher's experiments, the ideas of the inventor, the patterns of the manufacturer, the fashions of the *modiste;* all are intellectual property, until made the common property of everybody by verbal or written description, design, model, or any other mode. Once published and the poet cannot efface his poem from the memory of his readers, the philosopher hinder the utilization of his discovery, the inventor limit the benefits of his invention, the manufacturer withdraw his new pattern, or the *modiste* prevent the general adoption of the fashion introduced by her; all these thoughts and ideas cease

to be the property of the individual and become the property of the many.

But if we consider the bearing of this right in regard to literature, we find that comparatively very few works are really the intellectual property of their authors. Most of them merely recount facts and thoughts which were previously announced or expressed by others, consequently they were already common property, and are now again communicated in another form. Our century is rich in works on the natural sciences, but few of them contain anything not already discovered by the fertile brain of a Humboldt, a Cuvier, a Linné, and other great thinkers. The majority are merely reproductions of the intellectual property of these great discoverers in science. The standard historical works of Macaulay, Bancroft, Motley, and Prescott, contain no *new facts*, but only present in a *new shape* a narrative of events previously known to mankind, and consequently are *common* property. So, also, with the works of poets and novelists; they enlarge on themes either from history, or upon such subjects as are brought under their notice by observation of men and life in their various phases. Very little intellectual property is found in any modern work, but instead, reproduction, *i. e.*, representation of *old* facts and thoughts in a new dress. Original intellectual property in literature is not protected at all; were it by law established

a monopoly, the printing presses of the world would be idle and the progress of civilization would cease.

Analogous to the term "intellectual property" is the other, *literary property*. They differ, however, from each other in this, that intellectual property represents only thoughts and ideas unuttered, while literary property means rather the form in which thoughts and ideas are expressed or facts communicated. Like "intellectual property," the term, "literary property," is not well-defined or known to the law. Distinguished philologists, like Jacob Grimm, protest against the use of the former; great publicists, among others Savigny, have entirely ignored such a right as "literary property." Properly, we can only speak of "a right in literary products," or "a right of reproduction." This right certainly needs protection, *i. e.*, not in order to grant a monopoly to a few individuals, but in the interests of science and the common weal, as clearly expressed in Article 1, Section 8 of the Constitution, which reads: "Congress shall have power to *promote the progress of science and the useful arts*, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And this leads us to "copyright" and "reprint."

There exists a very material difference between *national* and *international* copyright; the former protecting against reprint in the author's own country, and the latter against reprint in foreign, particularly

trans-Atlantic countries. A National Copyright Law has existed for a long time in the different European countries, although not alike in all. As regards Germany, it is only within the last forty years that the copyright laws in that country have been so assimilated, as to protect an author in all the German States. Slight differences are even now to be found between the laws of the various German States on this subject. The *purpose* of such a law, however, is, as above quoted from the Constitution, not to create a monopoly for authors and publishers, but to promote science and art. The laws against reprint serve as a *means* to this end, for no publisher would stake his capital on the success of a work, if he were not secured against the competition of other publishers, who, while paying no more for paper and printing, pay nothing whatever to the author, and would, therefore, be enabled to sell their publications much cheaper. It is, therefore, only just to secure to authors, for a certain number of years, the fruits of their labor. For this purpose the laws of some countries grant to the author protection against reprint for a stated time, or, as is the case in some instances, for the author's lifetime, and even for several years after his death, the same privilege being continued to his heirs.

The country in which the law of copyright is most clearly defined and fixed, is, without doubt,

Germany. The reason of this is, that the country being divided into many independent governments, not bound by a common copyright law, it needed only the success of a work in one State to have it extensively reprinted in the others—a state of things which rendered it a ruinous undertaking for a publisher to risk his capital in the publication of a really good work. The production of good books being hampered in this way, the people at large suffered from the impediments thus presented to the progress of science and art, and this—not the purpose of enriching a few authors and publishers at the expense of the nation—led to the passage of the Copyright Law as now in force in Germany, and by virtue of which an author or publisher in one German State has his copyright protected in all the others. Formerly, matters in Germany were analogous to a state of things which would make a copyright secured in one State of the Union worthless in any of the other States, an author or publisher having no protection outside of his own State; but, thanks to the wisdom of the founders of our Republic, this protection is secured to every citizen of the United States by the Constitution, as long as that instrument is the fundamental law of the land.

After the Copyright Law, rendered a necessity to *promote the progress of science and art*, was thus passed in Germany, the egotism of some authors and pub-

lishers in that country occasioned an attempt to push it beyond its legitimate compass, and beyond the scope of its usefulness, as circumscribed by the common weal. During the last few years, for instance, the Copyright Law was further extended by the addition of a clause which gives to authors the right to reserve to themselves the translation of their works into foreign languages. This clause forbids the translation of any copyrighted work without permission of the author, provided he has complied with the regulations, by printing on the title-page the words, "Right of translation reserved." But what were the results? While formerly a large number of the works of German authors were translated into foreign languages, while the works of a Humboldt, a Schiller, a Goethe, and many other writers, were rendered into nearly all living tongues, and thousands of people of all nations, ignorant of the German language, could enjoy the literary wealth of Germany, only two or three German works have been translated in Europe since the passage of this addition to the Copyright Law, and thus, this regulation, brought about by a few authors and publishers interested in its establishment, has confined the usefulness of many a first-rate work within the narrow limits of one nation.

Another abuse of the Copyright Law was only a few months ago made manifest in Germany. The copyright of the works of Goethe, Schiller, and other classic authors, expired during the latter part of

1867. Although the monopoly of publishing these works had extended over a long term of years, an association of authors issued a circular appealing to the "honor" of publishers, and calling upon them not to publish, even now, any of that series, without first obtaining the permission of the heirs of the authors. And this, notwithstanding the law in consequence of which the copyright of these works was to terminate on the 9th November, 1867 ; and notwithstanding the fact that the great majority of the German people were, until then, unable to buy these works, on account of their high price. Of course, the aim of this circular was to pronounce, so to say, a social and moral excommunication against publishers who might act in accordance with the law, by printing some of the above works ; but in this, the parties who issued this circular were luckily foiled, and thus public interest protected. Already several cheap editions have appeared, and how well they meet the wishes and interests of the people at large, is proved by the fact that one of these editions has reached the enormous number of over one hundred thousand copies, and the others have also attained a very large circulation.

These facts are merely mentioned, because, although not directly bearing on the American Copyright Law, they serve to show to what mistakes a too liberal latitude of its principles may lead, if we lose sight of the fact that, as the above-quoted passage

from the Constitution has it, the aim of a Copyright Law is solely "*to promote the progress of science and the useful arts*"—in other words, that a Copyright Law is not an end in itself, nor a means in order to create monopolies, but rather furnishes the means to an end, *i. e.*, to the attainment of the above mentioned lofty aim.

No reasonable man will blame an author for selling the products of his brain as high as possible, but authors should not forget, on the other hand, that they have a nobler calling than the professional man or the mechanic; that their aim should not merely be to make money, and that if they oppose the harmonious working of the international exchange of ideas, by reprints and translations in other countries, *they also oppose the progress of popular knowledge.* The higher and more ideal value of literary work should certainly be consulted, and authors and publishers should allow the moral worth of their labors, as well as the financial gains, to influence their dealings with the people. American authors and publishers have probably less cause to act contrary to this maxim than all others, for in no country are authors better paid than in the United States, and that the publishing business here is a lucrative one, compared with Europe, the many wealthy and prosperous publishing firms in the United States attest.

The next subject to be discussed is *International*

Copyright. This may be defined as a treaty between two governments, by virtue of which books published in one of the two countries cannot be reprinted in the other. If a *national* copyright is in the interests of the public good, and of science and art, an *international* copyright is, on the contrary, a measure *opposed to the common weal*, because it taxes whole nations and continents, for the benefit of a few individuals, creates an obstacle to the spread of knowledge, and is, consequently, opposed to the progress and best interests of the people.

International copyright is a modern European institution. Only during the last decade have several European States concluded treaties with other States to that effect; for instance, England, France and Belgium, with Prussia; France and England, with Saxony; and Congress has also several times been petitioned in favor of such a measure, but has always, after thorough deliberation, refused to grant these petitions in reference to the passage of an International Copyright Law. In arriving at this decision, Congress was guided by the principle that in international legislation the good of the whole people of the United States should be consulted rather than that of other nations. This consideration, coupled with Washington's warning, to beware of "entangling alliances," and, above all, the paramount importance of *popular education*, have hitherto foiled all attempts to bring about this measure.

Notwithstanding repeated failures, the friends of International Copyright have again introduced a bill into Congress and are urging its passage with an earnestness which shows that they will leave no stone unturned to attain their ends. While this bill is pending, it may serve a good purpose to inquire, first: what moral foundation such a law would have; second: from what motives these repeated efforts for its passage spring; third: who are the authors of these attempts, and finally, whether it would be to the interests of the people of the United States that such a law should be passed.

In discussing the moral right of the reprint in America and other continents, of works published in Europe, the question of the existence of intellectual and literary property holds a prominent place. That question I have already answered, and I think I have clearly proved that the idea of intellectual or literary property, as understood by the advocates of the International Copyright Law, is entirely at variance with the definition of the word "property," as given by the highest legal authority. I have also shown that intellectual or literary property does not and cannot exist, because the necessary qualities and conditions of property are lacking, and that the very terms "intellectual" or "literary" property are merely empty phrases.

I have been forced by the necessarily limited space at my disposal to state only the cardinal points of

this question. The fullest justice is done to the subject in the "Letters on International Copyright," by Henry C. Carey, Esq., the greatest writer on Political Economy, of our times. So clearly and logically has the question been treated in these letters (of which a new edition, enlarged by the addition of an article on reprint, has recently been published by Messrs. Hurd & Houghton of New York), that no impartial reader can possibly remain an advocate of the false doctrine of "intellectual property." If then, this doctrine falls to the ground by its own inherent fallacy, it is equally certain, that the right in literary products can, in the interest of the whole people, only exist in a *national* sense in each respective country, and that, to extend it over *foreign* countries, means to impede the progress of knowledge, and consequently must prove an obstacle to the onward march of civilization.

It is also a fact, that from Europe in the past, all knowledge has emanated; that all intellectual progress is the common property of mankind, and that non-European nations have not, as yet, any literature of importance of their own (with the exception of the Greek, Oriental, and Hindoo literatures, which, however, are of no practical influence on the intellectual development of modern times), and are therefore forced to draw on the literary treasures of Europe in order to keep pace with the advancing civilization of the world.

These facts present an abundant moral justification of the right of reprint in this and other non-European countries.

The motives from which the efforts for the passage of an International Copyright Law spring, are of a two-fold character. We find them based principally on the wrong perception of the doctrine of literary property. And this cannot surprise us, for by far the greatest part of the people take very little interest in literary rights and affairs, and it is natural that, with the exception of those who make the study of this question a specialty, the community at large should know but little about it. This ignorance, coupled with the respect for the word "property" inherent in every honest man, has brought about the hue and cry against reprint in non-European countries, which for years has been kept up by a few interested authors and publishers in Europe, who designate reprint publishers as thieves, robbers, rogues, and pirates. How inapplicable such denunciations truly are will appear from the fact that the Harpers, Appletons, and other eminent publishing firms, are among those to whom such epithets are meant to apply, for all these houses have reprinted extensively, and yet their character for commercial integrity has ever been without a blemish. Indeed, the parties who so freely denounce the reprint publishers may consider themselves fortunate, if they have as little claim to these choice epithets as the objects of their

anger. To these attempts of some European authors and publishers to overawe every one not of their own opinion as to the expediency of an International Copyright Law, are now added the efforts of a few American authors and publishers, who, to promote their own interests, wish to bring about this measure. I say a *few* advisedly, for by far the greater part of the above class are too patriotic to lose sight of the public good in order to further their own interests. These few clamorous authors are not satisfied to obtain for their literary labors a pecuniary reward unheard of in Europe, and their publishers are not content with the immense sale of their publications, rendered possible by the vast extent and continually increasing population of the United States, but they would tax the whole world for their personal benefit.

On the other hand, some American publishers would fain have the monopoly of the works of European authors, and should they gain their ends, would sell their publications at prices which would make it impossible for the majority of American readers to purchase them. The present extraordinary cheapness of the works of English authors, enables thousands to obtain them. But grant the demands of the advocates of an International Copyright Law ; let their efforts be crowned with success ; give them the monopoly they so urgently crave ; and at once the prices of their publications will increase three and four-fold, and they will be placed beyond the reach of the great

mass of the people. Therefore, an International Copyright Law would be *against* the interests of the American people.

The United States is not, like Europe, the land of monopolies, but the land of liberty. Political and social liberty, however, is not complete without the fullest freedom of exchange of thought, and this freedom is not alone based on the liberty of the press, but finds its most perfect expression and safeguard in *the free and untrammelled exchange of the literature of all nations.* Whatever impedes this free exchange interferes with the great fundamental ideas of mankind—universal freedom and fraternization of all nations. International Copyright is an European institution, but even in Europe, we would seek its advocates in vain among the men of science. We would find them rather in the ranks of novelists and journalists, although there are many of these latter two classes who are also decidedly opposed to an International Copyright Law. But, supposing even the whole of monarchical Europe demanded this measure, should that rule our action in this matter, who profess to be the champions of freedom? How different are the laws and the whole manner of observing men and things in Europe from those which obtain here? *There*, for instance, many trades and professions need concessions and privileges totally unnecessary and unknown *here*; *there*, contracts for services to be rendered may be entered into for long terms—*here*, such terms are

limited; *there*, exist monopolies—*here*, none; *there*, is a nobility, primogeniture, feudalism—*here*, all these are unknown; *there*, class-privilege obtains before the law—*here*, everybody is alike before the law; *there*, game is property—*here*, free to everybody; *there*, people would be ashamed to carry a small parcel in the street—*here*, the wealthiest is not ashamed of labor, for labor is honorable; *there*, the press is gagged by all manner of restrictions—*here*, it is free. In Europe—aye, in Berlin, the "modern Athens of Europe," the so-called seat of intelligence and civilization, only a few months ago a court condemned a representative of the people to two years' confinement in the penitentiary, who had, in his seat in the Chamber, candidly uttered his opinion on some question before the house, because he considered it his duty to do so—*here*, freedom of speech is guaranteed; *there*, men are contented as subjects—*here*, people are proud to be free citizens; *there*, "orders" and decorations are held to be proud distinctions—*here*, a man who would accept them would expose himself to ridicule, and every American, conscious of his dignity as a free citizen, would regard even the offer of such a mark of servitude as an insult. In Europe, a man entertaining Republican views, is imprisoned—*here*, a man who would try to overthrow the Republic, and substitute monarchy, would commit high treason, punishable with death. What a difference in the institutions, and how hetero-

geneous the manners and customs of the two countries! Shall, then, the United States, who stand alone in the world as the champions of real social and political liberty, and who have given to the world a brilliant example of the power of free institutions—shall this country, untrue to its great past, and to its still greater future, *follow monarchical Europe* in the solution of so important a question as International Copyright? Shall we follow monarchical Europe, the whole influence of which is directed *against* the free development of mankind? Is it not rather our duty to watch our independence with Argus eyes, in this, as in all other respects; to bar every opening to European influence, and in this battle for the unshackled development of popular intellectual life to stand in the van of the world?

I repeat, the United States is not the land of monopolies, but the powerful protector of free competition. America, acting in accordance with this principle, offers to all countries from which it draws intellectual succor, a full equivalent; it says to the whole civilized world, reprint any of our works you will, and cull what pleases you. *The interests of popular education and fraternization of nations suffer no intellectual monopoly, but demand the fullest spread of knowledge all over the world and the untrammelled exchange of the literature of all countries without let or hindrance.* The independent and free development of the powers and inclinations given to mankind

by the Almighty being necessary to fulfil the ends of His creation, no impediment should be placed in the way of the most free and perfect exchange possible of the products of the human mind. Obstacles to the free exchange of thought can only be raised by individual interest, and must of necessity be detrimental to the public good.

As above remarked, American authors enjoy a greater remuneration for their labors, than those of any other nation, and do not need protection against foreign reprint. But to tax the people of the United States for the benefit of European authors would be as manifestly unjust, as to tax us for the benefit of European statesmen, generals, &c. Upon every nation devolves the duty of seeing its authors sufficiently well paid. This duty is discharged in the United States directly by the people themselves, who read more than the people of Europe, because they are enabled, by the increased prosperity arising from free institutions, to secure not only bodily but intellectual food in abundance. Consequently, very much larger editions are demanded, and this enables publishers to pay authors more liberally than is done in Europe.

If European authors are desirous of obtaining greater remuneration, let them labor for free institutions, and the success of their efforts will increase reading and the sale of books. At present, in Europe, the larger number of readers are dependent upon the circulating libraries for their instruction or

amusement, and these furnish but poor substitutes for purchased books, and are really an obstacle to intellectual development, for such books only can be procured from them as their managers see proper to furnish, and that only for a limited time; and further, the existence of these circulating libraries prevents the publication of large editions of popular works, such as are issued in America.

If European readers were enabled to purchase for themselves their literature on a more extended scale, European publishers could afford to pay authors as liberally as American authors are paid. A *free* people is always a thinking and a *reading* people; and in the same proportion, as the freedom of a nation is developed, so its desire to read develops itself, and also the pecuniary ability to gratify that desire by purchasing books.

No people read more than the American people, thanks to their free institutions, and thanks, also, to their magnificent free-school system. What other country of the same population can boast of a yearly expenditure of forty to fifty million dollars for educational purposes? The greater part of this sum is raised by direct taxation, and the money so obtained is not only expended on American children, but also on the children of immigrants and many thousands of adults who arrive on our shores, unable to read or write. Thus the American people educates readers —educates them with funds provided by the people.

And after a reading public is thus formed, which has no equal upon earth, should the same people who have brought about this result by taxing themselves willingly for so noble a purpose—who have rendered possible so grand and vast a system of popular education—who have created this thirst for knowledge, and consequent market for literature by their peerless liberality—should this very people be taxed again, in the interest of a few authors and publishers, who, as long as the literary market in the United States was still in its infancy, did nothing toward its development?

Europe finds in the United States a good market for its manufactures, and would fain work this mine of wealth in a literary sense also; would make us dependent on Europe (in the same manner that the literary interest of all England centres in London, or that of France in Paris), after a market for literature has been created here, through the operation of the principles on which our government was founded, and which distinguish it from all others. But the interests of modern times centre in the Western Hemisphere, and however much Europe may try to stay the onward march and progress of the world, Galileo's famous "and yet she moves" remains true for all ages.

If we now inquire, what would be the result of the passage of an International Copyright Law in the United States, we arrive at the following conclusions :

First.—All the publishers of reprints in the United States, the printers, paper manufacturers, type and stereotype founders, bookbinders, and many thousands of workmen employed in the production of reprinted works, would lose their occupations and their daily bread.

Second.—The price of works of European origin, reprinted here, would, in the absence of all competition, rise so enormously as to deprive nine tenths of those who now purchase them, of the ability to do so. Instead of a person of moderate means becoming the owner of his favorite books, circulating libraries, as they exist in many parts of Europe, would spring up, which would prove a serious check to the spread of literature and knowledge. If the public should finally become accustomed to that manner of supplying its literary wants, the publishing trade in original American works would undoubtedly also suffer greatly.

Third.—The people of the United States would be most unjustly taxed, in favor of a few authors and publishers.

Fourth.—By reason of the people having less ready access to European literature, the progress in intellectual culture would be impeded.

Last, but not least, the United States, upon which the world now looks as the protector of universal free

institutions, would, by the passage of an International Copyright Law, set an example which could not but operate unfavorably upon other countries now in process of development, such as South America, Australia, Asia, and Africa, and would retard civilization everywhere.

The custom which now obtains with American publishers, of publishing new European works from advance sheets, for which they pay the author a remuneration, has heretofore proved sufficient for the purposes for which the passage of an International Copyright Law is claimed, and has, at the same time, established *no* monopoly ; has *not* unduly taxed the people of the United States, and, while it has erected *no* barrier to intellectual progress, it has been remunerative to both publishers and authors. Why should not, then, this solution of the question of International Copyright, for the future as in the past, answer all ends, and satisfy all reasonable claims which authors and publishers have on the public?

I believe the American people have a right to hope that the representative wisdom of the nation, in Congress assembled, will refuse to pass an International Copyright Law.

New York, *March*, 1868.